Supreme Court, U.S.
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No. 05-1450

In The
Supreme Court of the United States

V. STEPHEN MOORE, and others similarly situated,

Petitioners,

vs.

ACCENTURE, LLP, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, and ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the United States District Court for the Northern District, Atlanta Division, entering a voluntary dismissal of this class action ERISA complaint by V. Stephen Moore (hereinafter "Plaintiff Moore"), despite the failure of the district court to notify the potential class members prior to the dismissal. This appeal challenges the district court's authority to dismiss the class action plaintiffs without notice to the class and whether this gives adequate protection to the rights of the class under Federal Rule of Civil Procedure 23(e)(1). The 2003 Amendment to Federal Rule of Civil Procedure 23 appears to suggest that class action plaintiffs require more notice than they received through the court's entry of the dismissal. The committee notes to the 2003 Amendment to Rule 23(e)(1) state that "Notice of a settlement binding on the class is required either when the settlement follows class certification *or when the decisions on certification and settlement proceed simultaneously.*" Fed. R. Civ. P. 23 (Committee Note, 2003 Amendments) (emphasis added). The Sixth Circuit is the only Circuit Court to have issued a decision since Rule 23(e) was amended in 2003. The district court's decision conflicts with the holdings of the Sixth Circuit.

Defendant Accenture, LLP/Andersen and its various employment plans (hereinafter "Accenture/Andersen") does not dispute that it had already granted the entire class the relief sought, except the requested attorneys' fees. This information was transmitted to Plaintiff Moore on December 9, 2004, the day after the attempted dismissal. Even though Accenture/Andersen says it granted

QUESTIONS PRESENTED – Continued

full relief, except attorneys' fees to the entire class, all Plaintiff Moore ever knew, and all that was ever presented to the court, was that Plaintiff Moore was granted the relief that he sought. The court made no determination as to whether the class did in fact receive the relief stated by Accenture/Andersen, or whether it was adequately protected.

On December 9, 2004, Accenture/Andersen notified Plaintiff Moore that it had reversed its position on the disability leave policy and no longer intended to terminate him, effective January 1, 2005, and allegedly notified all other similarly-situated employees of the same thing. On December 21, 2004, the class plaintiffs filed and served a second complaint, case no. 1:04-cv-03717-TWT (hereinafter "Moore II"). The purpose of the Moore II complaint was to seek the attorneys' fees previously granted to the class, as admitted by Accenture/Andersen. The second complaint should be considered an amended complaint, or, at a minimum, the second complaint related back to the first complaint as a renewal action. Contemporaneously with the filing of the Moore II complaint, the class plaintiffs filed a Motion for Attorneys' Fees. That motion was denied on May 6, 2005 on the bases that it was moot and for lack of standing. However, that holding was erroneous because Moore I was voluntarily dismissed by only Moore, not the putative class. Moreover, Plaintiff Moore's dismissal in Moore I was presented as a motion to dismiss so that the class action plaintiffs could receive adequate notice and a chance to respond before a decision was entered by the court.

QUESTIONS PRESENTED – Continued

Out of an abundance of caution, on January 4, 2005, the class plaintiffs in Moore I also filed a Special Motion for Fees and Costs and Motion for Limited Discovery with Brief in Support. Judge Thomas W. Thrash issued an Order on September 16, 2005, denying Plaintiffs' Motion for Attorney Fees, Motion for Costs, and Motion for Discovery. Unfortunately, Judge Thrash has made a clearly erroneous ruling because the case has never been properly dismissed and because he failed to analyze the dismissal under ERISA.

Under Eleventh Circuit precedent, the district court was required to conduct a five part test to determine whether attorneys' fees are appropriate to the prevailing party under ERISA. However, the Eighth Circuit requires no analysis and has determined that the prevailing party, absent special circumstances, is automatically entitled to attorneys' fees. Thus, there is a split in the circuits concerning how the ERISA request for fees should have been addressed.

In response to Judge Thrash's final Order, the class plaintiffs filed a Notice of Appeal on September 27, 2005.

The three questions presented are as follows:

1. How does the 2003 amendment to Rule 23(e)(1) affect a district court's obligation to notify potential class members prior to the dismissal of a class action complaint: Is the district court required, at a minimum, to review and decide whether notice to the putative class members is required, and that the rights of the class have been adequately protected?

QUESTIONS PRESENTED – Continued

2. Whether the class plaintiffs are entitled to the prior attorneys' fees award, notwithstanding the district court's subsequent dismissal.

3. Whether the prevailing party in an ERISA case is entitled to an attorneys' fees award even if this court holds that Rule 23(e)(1) did not require the district court to give notice to the class prior to dismissal. There is currently a split in the circuits in which the eighth circuit mandates that the prevailing party in an ERISA case is entitled to attorneys' fees, while the remaining circuits hold that the award of attorneys' fees to the prevailing party is subject to a discretionary analysis.

LIST OF PARTIES

Petitioners are V. Stephen Moore, class representative, and others similarly situated.

Respondents are Accenture, LLP, formerly Andersen Consulting, LLP, Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan.

CORPORATE DISCLOSURE STATEMENT

Defendant Accenture, LLP, formally Andersen Consulting, LLP and once a part of the now failed Arthur Andersen, LLP, is an Illinois limited liability partnership.

Defendant Accenture United States Group Medical Plan (hereinafter "Medical Plan") is an employer-sponsored welfare benefit plan.

Defendant Accenture United States Group Dental Plan (hereinafter "Dental Plan") is an employer-sponsored welfare benefit plan.

Defendants Accenture United States Basic Life/ Accidental Death & Dismemberment Insurance Plan, Accenture United States Optional Life Insurance Plan, and Accenture United States Optional Accidental Death & Dismemberment Insurance Plan (hereinafter "Life Insurance Plans") are employer-sponsored welfare benefit plans.

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OPINION BELOW

The opinion of the court of appeals (05-15375-E) is unreported. However, the opinion is included herewith as Appendix A.

STATEMENT OF JURISDICTION

The Judgment of the court of appeals was entered on February 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Rules of Civil Procedure, including Rule 23(e)(1) and Rule 41(a)(1), and relevant provisions of ERISA, including 29 U.S.C. § 1132(g)(1).

STATEMENT OF THE CASE

Petitioners/Plaintiffs (hereinafter "class plaintiffs," when referring to the entire class, or "Plaintiff Moore," when referring to class representative V. Stephen Moore) filed an ERISA class action complaint on October 25, 2004 (hereinafter "Moore I"). Plaintiff Moore worked for Andersen Consulting, LLP, which later became Accenture, LLP (hereinafter "Accenture/Andersen," or "the Company"), in Atlanta from August, 1987 until he became disabled on October 15, 1992. When Andersen Consulting split from Arthur Andersen, LLP, it was legally obligated to distinguish itself; therefore, it was renamed Accenture, LLP.

Pursuant to his employment with Accenture/Andersen, Plaintiff Moore had been a participant in the various disability plans that were sponsored by the Company and/or their predecessors since 1987 (hereinafter "the Plans"). In 1992, Plaintiff Moore notified Accenture/Andersen that he suffered from a disabling medical condition. In response, Accenture/Andersen placed Plaintiff Moore in an unpaid leave of absence status beginning on October 15, 1992, which allowed Plaintiff Moore to continue participating in and receiving benefits from the Plans by paying the employee portion of the premiums. The other class members, other disabled employees, were similarly allowed to continue participating in and receiving benefits from the Plans by paying the employee portion of the premiums. Accenture/Andersen assured Plaintiff Moore that he would remain eligible to participate in the Plans for as long as his disability lasted. Plaintiff Moore was then, and remains, an active paid participant in the Plans. The underlying litigation was not about the failure to pay disability benefits, but rather interference with and discontinuation of other benefits.

Nevertheless, Accenture/Andersen notified the class plaintiffs of a change in its policies in 2002 by sending out a memorandum dated December 18, 2002, titled "U.S. Accenture People currently on Long-Term Disability Leave of Absence." Through this memorandum, Accenture/Andersen informed the class members, who were already on disability leave, of a change in leave policy. Accenture/Andersen informed Plaintiff Moore that changes to its policies and to the Plans would result in termination of his employment on January 1, 2005, and thus in the loss of his eligibility for health, dental and life insurance benefits through the Plans. Accenture/Andersen

made this change to its disability leave policy, despite the assurances made to its employees already on disability leave and in violation of the Plans' fiduciary duties to their beneficiaries. In addition, Accenture/Andersen failed to include any "grandfather" clause, so that people like Plaintiff Moore, who had been on leave for years, who were over forty, and who would most likely not qualify for any reasonably priced health, dental nor life insurance, would not suffer catastrophic health care costs and other losses as a result of the Company's actions with respect to the Plans.

Plaintiff Moore filed his complaint on behalf of himself and others similarly situated (a class action) in the Northern District of Georgia for violations of 29 U.S.C. §§ 1132(a)(1), *et seq.* and 1140, against Accenture/Andersen and its various employee benefit plans: Accenture United States Basic Life/Accidental Death & Dismemberment Insurance Plan, Accenture United States Group Dental Plan, Accenture United States Group Medical Plan, Accenture United States Optional Accidental Death & Dismemberment Insurance Plan, and Accenture United States Optional Life Insurance Plan. Prior to the now infamous Enron related dissolution of Arthur Andersen, LLP, Andersen spun off its consulting branch, which was renamed Accenture, LLP. Plaintiff Moore's employment was transferred with the spinoff to Accenture. Plaintiff Moore attempted to voluntarily dismiss his Complaint, and his Complaint only, on December 8, 2004.

The dismissal did not state that the entire class was being dismissed. Instead, it was presented as a motion to dismiss, intending to preserve the rights of the other claimants and provide them with an opportunity to respond and the district court an opportunity to dismiss

Moore, individually. The clerk, however, then erroneously dismissed the claim against the entire class pursuant to Rule 41(a). Moreover, before Plaintiff Moore filed his Motion to Dismiss, Accenture/Andersen had already granted the entire class the relief sought, except the requested attorneys' fees. This information was transmitted to Plaintiff Moore and, according to Defendant to the other class plaintiffs, the day after the attempted dismissal, December 9, 2004. However, without a proper analysis from the court, there is no way to tell whether the class did indeed receive this relief.

Federal Rule of Civil Procedure 23(e)(1) was amended in 2003 and states:

> (1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.
>
> (B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> (C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.
>
> (2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.
>
> (3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse

> to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> (4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).
>
> (B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

The amendment to the Rule has caused a somewhat unclear standard concerning the voluntary dismissal of class actions by the class representative. The committee notes state that notice of a settlement requires the court to notify the individual members of the class under these circumstances. Thus, those committee notes appear to make the dismissal in this case invalid. In fact, the only circuit court that has issued a decision on this topic since the 2003 amendment is the Sixth Circuit. The Sixth Circuit's decision should be controlling law because the only other courts that have addressed this issue are district courts.

On December 9, 2004, Accenture/Andersen notified Plaintiff Moore that it had reversed its position on the disability leave policy and no longer intended to terminate him effective January 1, 2005. Accenture/Andersen has represented that it made this same decision with respect to the remaining class Plaintiffs; however, no action was taken by the court to ensure that the class plaintiffs were adequately protected. On December 21, 2004, Plaintiff Moore and the class plaintiffs filed and served a second complaint, case no. 1:04-cv-03717-TWT ("Moore II"). The purpose of the Moore II complaint was to seek the attorneys' fees for the

relief previously granted to the class. The second complaint should be considered an amended complaint, or, at a minimum, the second complaint related back to the first complaint as a renewal action, as all issues in Moore II were raised in Moore I. Contemporaneously with the filing of the Moore II complaint, the class plaintiffs filed a Motion for Attorneys' Fees. That motion was denied on May 6, 2005, and that case was erroneously dismissed for mootness and lack of standing. However, Moore I was voluntarily dismissed with respect to only Moore, rather than the entire class.

Out of an abundance of caution, on January 4, 2005, the class plaintiffs also filed a Special Motion for Fees and Costs and Motion for Limited Discovery with Brief in Support in the present action, Moore I. Judge Thomas W. Thrash issued an Order on September 16, 2005, denying Plaintiffs' Motion for Attorney Fees, Motion for Costs, and Motion for Discovery in Moore I. Unfortunately, Judge Thrash's ruling is clearly erroneous because the case has never been properly dismissed, and because Judge Thrash failed to address the fee issue pursuant to ERISA, which allows for fees even after a case has been dismissed. There is a split in the circuits as to how Judge Thrash should have exercised his discretion in reviewing the request for fees. However, Judge Thrash used no discretion at all because he refused to address the ERISA request for fees. In response to Judge Thrash's final Order, Plaintiffs filed a Notice of Appeal on September 27, 2005. The Eleventh Circuit panel reached its decision on February 10, 2006, affirming the erroneous decision by the district court without reaching a decision on the validity of the dismissal, or the judge's failure to address the ERISA fees standard.

REASONS FOR THE ALLOWANCE OF THE WRIT

I. THE 2003 AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 23(E)(1) HAS CAUSED A SPLIT IN THE CIRCUITS REGARDING A COURT'S OBLIGATION TO NOTIFY POTENTIAL CLASS MEMBERS PRIOR TO THE DISMISSAL OF A CLASS ACTION COMPLAINT PARTICULARLY BECAUSE THE RIGHTS OF THE CLASS MAY BE ADVERSELY AFFECTED BY THE DISMISSAL.

After the amendment to Rule 23(e)(1), the only circuit to address the issue concerning notice to the class before a dismissal can be granted has been the Sixth. The District Court of Kansas in *Aikens v. Deluxe Fin. Servs., Inc.*, Civ. Action No. 01-2427-CM, 2005 WL 1041351 (D. Kan. March 2, 2005), and the Northern District of Illinois in *Daniels v. Bursey*, Case No. 03 C 1550, 2006 WL 468015 (N.D. Ill. October 19, 2004), have held that notice to the class prior to dismissal is only required after the class is certified. However, the Court of Appeals for the Sixth Circuit has held, "[e]ven the circuits that have not required notice to only putative class members as a general rule have warned that failure to provide notice is justified only in instances free of prejudice and collusion." *Doe v. Lexington-Fayette County Gov't*, 407 F.3d 755, 761 (6th Cir. 2005), The court went on to say:

> Most requests for voluntary dismissals . . . are made before there has been any class ruling. Whether a voluntary dismissal in these circumstances is sought in connection with a proposed settlement of claims of the individual plaintiff only or in the non-settlement context, most courts have stressed the need under Rule 23(e) to examine whether any prejudice to the class will

> result if the dismissal of the action is allowed without class notice. *Id.*

In other words, the Sixth Circuit has held that the court at a minimum must analyze the specific class action and determine whether notice is required, even if the class has not been certified. *Lexington-Fayette* at 762. The Court went on to say "[i]f, upon examination, the district court should find that the putative class members are likely to be prejudiced on account of a settlement or dismissal, the district court should provide Rule 23(e)(1) notice." *Id.* The Sixth Circuit specifically stated that "the context in which 'class' is used in Rule 23(e)(1) indicates that it is not limited to a certified class." *Lexington-Fayette* at 761, This ruling was after the 2003 amendment to Rule 23(e)(1) and is the only published circuit court ruling on the matter.

Moreover, the committee notes to the 2003 amendment clearly state that "[n]otice of a settlement binding on the class is required either when the settlement follows class certification *or when the decisions on certification and settlement proceed simultaneously.*" Fed. R. Civ. P. 23 (Committee Note, 2003 Amendments) (emphasis added). In the case at bar, Plaintiff Moore at all times was negotiating with Accenture/Andersen to obtain relief on behalf of himself and others similarly situated while the class certification process was being pursued. In fact, the dismissal was necessary because the certification motion was due on or about January 25, 2005. Fed. R. Civ. P. 23. The committee notes continue to state that, "[r]easonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action – such as filing claims. . . ." Fed. R. Civ. P. 23 (Committee

Note, 2003 Amendments). This is why it is important to identify whether the relief was granted to the entire class. In other words, by dismissing the entire class, the court was effectively restarting the statute of limitations which had previously been tolled by the action. The court owed the absent class members notice so that they could protect their interests and file separate claims, or alternatively, file motions to intervene as class representatives. It was, therefore, incumbent on the court to investigate whether notice of the dismissal was given to the other potential class members.

This argument is not to imply anything other than to stand for the proposition that the trial court should have taken time to examine the potential effect the voluntary dismissal would have on the class. By not doing so, the court failed to protect the procedural due process rights of the class members.

II. THE COURT ERRED IN DENYING THE PLAINTIFFS' ATTORNEYS' FEES BECAUSE THE RELIEF WAS GRANTED PRIOR TO THE DISMISSAL.

Even assuming that the Complaint was properly dismissed on December 8, 2004, the relief was clearly granted prior to that day. Plaintiff Moore attempted to dismiss the class Complaint on December 8, 2004. The following day, Plaintiff Moore's counsel was notified that the relief sought had been granted. In Moore II, the district court based its decision on the ground that the relief was subsequent to the dismissal of Moore I. Yet, the decision to grant the relief by Accenture/Andersen was clearly made prior to Plaintiff Moore's attempted and unallowable dismissal of the class. Whether Plaintiff

Moore knew that the relief had been granted at the time of his attempt to dismiss is irrelevant. In fact, the dismissal did not state that it was being dismissed by the class. It simply stated: "COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby moves pursuant to Federal Rule of Civil Procedure 41(a)(1), to voluntarily dismiss without prejudice the above-styled action." Even though the voluntary dismissal was under Rule 41(a)(1), Plaintiff Moore moved the court to intervene; he was not taking and could not take unilateral action that was binding the class. The appropriate analysis should, therefore, recognize that the voluntary dismissal included a motion, and it was wrong for the clerk of court to take action on a motion without providing the requisite notice to the class members.

Furthermore, the court did not make a determination that the relief was in fact provided to the other class members. This is of the upmost importance given the statute of limitations to bring this action was on the verge of expiring, and especially given that the class did not dismiss its claims. Moreover, it is not realistic to conclude that a company the size of Accenture/Andersen made the decision to rehire an entire class of employees, then notified the employees on the same day. Clearly, the decision was made prior to the time it was conveyed to Plaintiff Moore. At the very least, this is a discoverable matter upon remand. Therefore, the district court erred by holding that the Moore I complaint was dismissed prior to the relief being granted.

If a class is able to obtain substantial relief, then they are entitled to their attorneys' fees. *See Williams v. City of Fairburn*, 702 F.2d 973 (11th Cir. 1983); *Watkins v. Mobile Housing Board*, 32 F.2d 565 (5th Cir. 1980); *Iranian*

Student's Association v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979). "There is no doubt that [plaintiff], as a prevailing party is entitled to attorney's fees." *Williams*, at 975.

In this case, Plaintiff Moore, and allegedly the entire class, obtained all of the relief sought, except the fees. Therefore, the class is entitled to an award of fees. Accenture/Andersen does not dispute that the relief was granted to the entire class. In fact, it is their argument in this action. The entire class was being terminated from employment, which would have eliminated their right to employee health and other benefits. After this suit was filed, Accenture/Andersen alleges that the class was reinstated and employee health and other benefits were continued. This is the exact type of relief that warrants an award of attorneys' fees in a class action suit. The Eleventh Circuit has held that when a class is able to obtain the relief that it seeks, then the class has prevailed for attorneys' fees purposes. *Fields v. City of Tarpon Springs, Florida*, 721 F.2d 318, 319 (11th Cir. 1983) ("The District Court nonetheless found that the lawsuit had been the catalyst for relief and found that the plaintiffs/appellees had prevailed. . . .").

The case law is clear that a prevailing party in a class action is entitled to an award of attorneys' fees. There is no dispute between Plaintiff Moore that the class in Moore I and Moore II received all, of the relief sought, except for attorneys' fees. The court was under a duty to provide notice to the rest of the class. The attempted voluntary dismissal has no effect on the matter. "[I]t is not inconsistent to find a party that voluntarily dismisses its action has nonetheless prevailed." *Fields*, at 321.

III. THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO THE GRANTING OF ATTORNEYS' FEES EVEN IF THIS COURT HOLDS THAT RULE 23(E)(1) DID NOT REQUIRE THE DISTRICT COURT TO GIVE NOTICE TO THE CLASS PRIOR TO DISMISSAL. THERE IS CURRENTLY A SPLIT IN THE CIRCUITS IN WHICH THE EIGHTH CIRCUIT MANDATES THAT THE PREVAILING PARTY IN AN ERISA CASE IS ENTITLED TO ATTORNEYS' FEES, WHILE THE REMAINING CIRCUITS HOLD THAT THE AWARD OF ATTORNEYS' FEES TO THE PREVAILING PARTY IS SUBJECT TO A DISCRETIONARY ANALYSIS.

The district court erred in this matter by refusing to conduct any analysis on whether attorneys' fees were appropriate pursuant to ERISA. 29 U.S.C. § 1132(g)(1) provides "In any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The Eleventh Circuit, the circuit in which this action was brought, requires the court to conduct an analysis to determine if attorney's fees in an ERISA case are appropriate. However, the Eighth Circuit has held that "[t]his section should be read broadly to mean that a plan participant or beneficiary if he prevails in his suit under § 1132 to enforce his rights under his plan, should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980); citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 966, 19 L. Ed. 2d 1263 (1968). If following the rule in the Eighth Circuit, no analysis was

necessary, and, as the prevailing party, Plaintiff Moore is thus entitled to attorneys' fees.

The remaining circuits have held that the prevailing party is entitled to fees only after an analysis is completed. The decision to award fees is then within the discretion of the district court. "A district court considering a motion for attorney's fees under ERISA should apply its discretion consistent with the purposes of ERISA, those purposes being to protect employee rights and to secure effective access to federal courts." *Smith v. CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984). However, in this case, no analysis was conducted by the district court, therefore, the case should at a minimum be remanded back to the district court for a determination on attorneys' fees under the applicable ERISA analysis.

In order to establish entitlement to a fee award under ERISA, the plaintiff must show that "[he] succeeded on any significant issue in litigation which achieves some benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40, 50 (1983). Because the class plaintiffs' actions induced Accenture/Andersen to reverse their position, at least as to Plaintiff Moore and allegedly for the entire class, and provided substantial equitable relief by not instituting the discriminatory amendments to its disability leave policy, Plaintiff Moore and the class succeeded on significant issues in litigation that achieved the substantial benefit sought. If the relief was granted to the entire class, it is irrelevant if the class plaintiffs met these ends prior to the adjudication of their suit. Their claim to fees is not weakened. *See Dunn v. The Florida Bar*, 889 F.2d 1010, 1013 (11th Cir. 1989), *citing Iranian Students Association v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981);

"A party may prevail and be entitled to attorney's fees when remedial action by the Defendant effectively moots the controversy subsequent to the filing of the lawsuit" *Id.* at 1163.

Courts consider the following factors when determining whether to award attorneys' fees under ERISA:

> (1) the degree of opposing parties culpability of bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of attorneys' fees against opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan; and (5) the relative merits of the parties' positions.

See Hummell v. S.E. Rycoff & Co., 634 F.2d 446 (9th Cir, 1980). These factors weigh in favor of a fee award for Plaintiff Moore and the class under ERISA.

The following will analyze the instant case under the *Hummell* rule: First, there is bad faith, as evidenced by Accenture/Andersen's refusal to negotiate even with the named plaintiff; inability to articulate a reason for the firing of the entire class, other than corporate greed; and their illegal employment action aimed at the weakest members of society, the aged and disabled. Moreover, Accenture/Andersen has a previous history of malfeasance and greed, as evidenced by their failure to acknowledge the conflict of interest that brought down both Enron and its parent company, Arthur Andersen, LLP, in the Enron scandal. Moreover, the speed with which Accenture/Andersen reversed its position upon learning of the class action lawsuit suggests that Accenture/Andersen itself was aware that its conduct was unlawful. For the class plaintiffs, the

change in policy would have meant termination of employment and no longer having access to group coverage for health, dental, and life insurance. As disabled persons seeking health insurance the class plaintiffs would have had to pay extraordinary costs for coverage, if they would qualify with their pre-existing conditions, which is unlikely. This harsh result for the class plaintiffs, coupled with the lack of a business purpose for the policy, further indicate the bad faith of Accenture/Andersen.

The second factor is the opposing party's ability to pay if relief was in fact provided to the entire class. Accenture/Andersen has the ability to pay the fees requested, which amount to thirty percent of the value of the remedial action for the class Plaintiffs. Accenture/Andersen is a huge international corporation with thousands of employees which recently won a ten billion dollar contract with the Department of Homeland Security to upgrade the tracking systems for immigrants in the U.S. Ability is not an issue and earnings arc a matter of public record. The company is publicly traded and its finances are a matter of public record.

The third factor under Hummell is deterrence. A fee award in this matter would assist in deterring like conduct from others in the industry. A fee award sends the message that discrimination will not be tolerated and that ERISA plans must treat their beneficiaries according to the letter of the law. Further, because the policy reversal was Accenture/Andersen's response to a potentially damaging class action lawsuit and not the product of a structured settlement agreement, there is nothing to bind. Accenture/Andersen to its policy decision. A fee award would serve not only to deter other companies, but also to deter Accenture/Andersen from re-instituting the discriminatory policies

next week or next year, and would bind Accenture/Andersen as required under Rule 23(e)(1).

The fourth factor in determining a fee award under Hummell is whether the plaintiff sought to benefit all participants and beneficiaries. Plaintiff Moore has sought to act for the benefit of all others similarly-situated, and the merit of his position is supported by the unwillingness of Accenture/Andersen to litigate this matter to conclusion, and their granting of relief to the entire class. Plaintiff Moore, in his complaint, noted that he intended to seek class certification in this matter. Although a class had not yet been certified by the Court, Plaintiff Moore had begun the extensive process of obtaining class certification and had conveyed his intentions to Accenture/Andersen. Plaintiff Moore's attempted dismissal was filed in order to gain time to properly represent the class.

Finally, the fifth factor under Hummell examines the merits of the plaintiff's position. Plaintiff Moore's position was clearly meritorious as evidenced by the swift reversal in posture by Accenture/Andersen. Had Accenture/Andersen truly believed its actions were lawful, it would have had no problem pressing forward with the litigation. Clearly, concern over losing a class action lawsuit on this issue persuaded Accenture/Andersen to institute substantial equitable relief for Plaintiff Moore and allegedly for the entire class.

Here, Plaintiff Moore's actions induced Accenture/Andersen to provide substantial equitable relief to the entire class by not instituting the scheduled change to Accenture's Leave Without Pay policy on December 31, 2004. As a result, Plaintiff Moore succeeded on a significant issue in the instant litigation, i.e., Defendants agreed

to permit Plaintiff Moore to continue participating in the Plans and to continue receiving benefits from the Plans. Accenture/Andersen does not dispute that this relief was also granted to the entire class, which establishes the right to recover for fees pursuant to Rule 23(e)(1), based upon relief obtained on behalf of a class.

CONCLUSION

This petition should be granted because the district court allowed the court clerk to dismiss the action on behalf of the class when clearly the court had additional duties to perform before the dismissal should have been allowed. At a bare minimum, this case created a split in the circuits on how a Rule 23 voluntary dismissal should be handled, which needs to be resolved here. Moreover, the relief was granted before the dismissal, thus entitling the class to fees. Finally, there is a split in the circuits on how the trial court should have exercised its discretion in analyzing the case for a fee award under ERISA.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-15375
Non-Argument Calendar

D.C. Docket No. 04-03116-CV-TWT-1

V. STEPHEN MOORE, individually and
on behalf of all others similarly situated,

Plaintiff-Appellant,

versus

ACCENTURE, LLP,
ACCENTURE UNITED STATES GROUP MEDICAL PLAN,
ACCENTURES UNITED STATES GROUP DENTAL PLAN,
ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL
DEATH & DISMEMBERMENT INSURANCE PLAN,
ACCENTURE UNITED STATES OPTIONAL LIFE
INSURANCE PLAN,
ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL
DEATH & DISMEMBERMENT INSURANCE PLAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(February 10, 2006)

Before CARNES, PRYOR and HILL, Circuit Judges.

PER CURIAM:

V. Stephen Moore filed his original complaint seeking relief from defendants' new leave policy on October 25, 2004. He styled it as a class action, but never moved for nor was it ever certified as such. Nor was the original complaint ever served on any of the defendants.

On December 8, 2004, Moore filed a Notice of Voluntary Dismissal pursuant to Fed. R. Civ. P. 41(1)(a)(i). According to Moore's Initial Brief on appeal, he sought voluntary dismissal "in order to gain time to more properly represent the class through negotiated settlement rather than litigation."

On December 9, 2004, Moore states that he was notified by the defendants that they had changed their leave policy. Subsequently, he filed a motion seeking attorneys' fees, costs and for discovery in the dismissed case, arguing that he was a prevailing party. The district court denied the motion, holding that Moore had voluntarily dismissed the action before he obtained any relief for himself or the putative class.

Our review of the briefs and the record support the conclusion of the district court, and finding no reversible error, the denial of the motion is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, Individually and On behalf of all others similarly situated, Plaintiffs, v. ACCENTURE, L.L.P., ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN and ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, Defendants.	CIVIL ACTION FILE NO. 1:04-cv-3116-TWT COMPLAINT – CLASS ACTION JURY TRIAL DEMANDED

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

(Filed Dec. 8, 2004)

COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a), to voluntarily dismiss without prejudice the above-styled action.

Respectfully submitted, this 7th day of December, 2004.

MELVILLE JOHNSON, P.C.

/s/ Christopher D. Vaughn
Christopher D. Vaughn
Georgia Bar No. 726226

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, Individually and On behalf of all others similarly situated, Plaintiffs, v. ACCENTURE, L.L.P., ACCENTURE UNITED STATES GROUP MEDICAL PLAN, ACCENTURE UNITED STATES GROUP DENTAL PLAN, ACCENTURE UNITED STATES BASIC LIFE/ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, ACCENTURE UNITED STATES OPTIONAL LIFE INSURANCE PLAN and ACCENTURE UNITED STATES OPTIONAL ACCIDENTAL DEATH & DISMEMBERMENT INSURANCE PLAN, Defendants.	CIVIL ACTION FILE NO. 1:04-cv-3116-TWT COMPLAINT – CLASS ACTION JURY TRIAL DEMANDED

NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

(Filed Dec. 8, 2004)

COMES NOW, V. Steven Moore, Plaintiff in the above-styled action, by and through counsel and hereby move pursuant to Federal Rule of Civil Procedure 41(a), to voluntarily dismiss without prejudice the above-styled action.

Respectfully submitted, this 7th day of December, 2004.

MELVILLE JOHNSON, P.C.

/s/ Christopher D. Vaughn
Christopher D. Vaughn
Georgia Bar No. 726226

44 Broad Street, N.W.
Suite 222

Entered as dismissed pursuant to Rule 41(a)(l)(i)~~(ii)~~, F.R.C.P.

Luther D. Thomas, Clerk

By: /s/ [Illegible]
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

V. STEPHEN MOORE, individually and on behalf of all others similarly situated, Plaintiff, v. ACCENTURE, LLP, et al., Defendants.	CIVIL ACTION FILE NO. 1:04-CV-3116-TWT

ORDER

This is an ERISA action. It is before the Court on the Plaintiff's Motion for Attorney Fees, for Costs and for Discovery [Doc. 4]. The Plaintiff voluntarily dismissed this action before he obtained any substantive relief for himself or the class that he claimed to represent. An award of attorney fees is not appropriate. The Plaintiff's Motion for Attorney Fees, for Costs and for Discovery [Doc. 4] is DENIED.

SO ORDERED, this 16 day of September, 2005.

/s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge